Alupole (M) Sdn Bhd v Metal One Engineering Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-08–49–03 OF 2023
HADHARIAH ISMAIL, AZMAN ABDULLAH AND AZMI ARIFFIN JJCA
27 NOVEMBER 2023

Civil Procedure — Appeal — Application for leave to appeal — High Court affirmed decision of sessions court in dismissing applicant's claim and allowed respondent's counterclaim — Whether leave application ought to be allowed

This was the applicant's ('the plaintiff') notice of motion for leave to appeal against the decision of the High Court in dismissing the plaintiff's appeal against the decision of the sessions court judge. An Australian company named Liquip Victoria had awarded the plaintiff a contract to supply aluminium alloys. The plaintiff appointed the defendant to supply 20 aluminium alloys flood lighting columns ('AAFLCs') pursuant to a purchase order dated 21 March 2019 ('the first PO') in order for the plaintiff to fulfil the order made by Liquip Victoria. The first PO was then substituted by the purchase order dated 25 March 2019 ('the second PO') due to a typographical error. The payments were to be made in four tranches. The plaintiff had made the first and second payments to the defendant. It was the plaintiff's case that the defendant was supposed to have delivered the AAFLCs by late May or early June 2019. Unfortunately, this did not happen which resulted in considerable delay and eventually in September 2019, the plaintiff had to procure the AAFLCs from a company in China. It was the defendant's case that in June 2019, the defendant had completed the fabrication work for 20 sets of AAFLCs and had performed their obligations under the PO and there was no total failure of consideration. The invoice for the outstanding sum of RM34,642.50 due to the defendant was still not paid. The plaintiff filed a suit against the defendant in the sessions court for a refund of deposit, a refund of the second stage payment and a reimbursement for new the order of AAFLC which the plaintiff had to obtained from China, interest and costs. The defendant filed their defence and its counterclaim against the plaintiff claiming for a declaration that the amended PO was unlawfully terminated by the plaintiff and the sum of RM34,642.50 was to be paid to the defendant. The learned sessions court judge dismissed the plaintiff's claim and allowed the counterclaim. Dissatisfied, the plaintiff filed an appeal to the High Court. The learned High Court judge dismissed the plaintiff's appeal and affirmed the sessions court decision. Hence, this application for leave to appeal by the plaintiff.

Held, dismissing the application with costs of RM10,000:

(1) There was sufficient appreciation of the evidence in its entirety by the trial judge in arriving at the conclusion that the defendant had fulfilled all its obligations. There was unequivocally no prima facie error as the facts and law had been appropriately and inclusively considered and rightfully decided upon by the trial judge and appellate judge. The merits of the leave application were, in any event irrelevant. The plaintiff had also failed to raise any questions of law but instead merely advance questions of fact which had been appropriately addressed in detail by the trial judge. The plaintiff had failed to meet the principles enunciated by the court in *Pang Hon Chin v Nahar Singh* [1986] 2 MLJ 145. In the premises, there were no merits in the plaintiff's application to warrant the court to exercise its powers to interfere with the finding of the court below (see paras 24–27).

[Bahasa Malaysia summary

Ini adalah notis usul pemohon ('plaintif') bagi kebenaran merayu terhadap keputusan Mahkamah Tinggi yang menolak rayuan plaintif terhadap keputusan hakim mahkamah sesyen. Sebuah syarikat Australia bernama Liquip Victoria telah menganugerahkan plaintif kontrak untuk membekalkan aloi aluminium. Plaintif melantik defendan untuk membekalkan 20 tiang lampu banjir aloi aluminium ('AAFLC') menurut pesanan pembelian bertarikh 21 Mac 2019 ('PO pertama') bagi membolehkan plaintif memenuhi perintah yang dibuat oleh Liquip Victoria. PO pertama kemudiannya digantikan dengan pesanan pembelian bertarikh 25 Mac 2019 ('PO kedua') kerana kesilapan tipografi. Bayaran perlu dibuat dalam empat peringkat. Plaintif telah membuat bayaran pertama dan kedua kepada defendan. Adalah kes plaintif bahawa defendan sepatutnya menyerahkan AAFLC pada akhir Mei atau awal Jun 2019. Malangnya, ini tidak berlaku yang mengakibatkan kelewatan yang agak besar dan akhirnya pada September 2019, plaintif terpaksa mendapatkan AAFLC daripada sebuah syarikat di China. Adalah menjadi kes defendan bahawa pada Jun 2019, defendan telah menyelesaikan kerja fabrikasi untuk 20 set AAFLC dan telah melaksanakan kewajipan mereka di bawah PO dan tiada sebarang kegagalan pertimbangan. Invois bagi jumlah tertunggak sebanyak RM34,642.50 yang terhutang kepada defendan masih belum dibayar. Plaintif memfailkan saman terhadap defendan di mahkamah sesyen untuk pemulangan deposit, pemulangan bayaran peringkat kedua dan pembayaran balik untuk pesanan baharu AAFLC yang perlu diperoleh plaintif dari China, faedah dan kos. Defendan memfailkan pembelaan mereka dan tuntutan balasnya terhadap plaintif yang menuntut pengisytiharan bahawa PO yang dipinda telah ditamatkan secara tidak sah oleh plaintif dan jumlah RM34,642.50 perlu dibayar kepada defendan. Hakim mahkamah sesyen yang bijaksana menolak tuntutan plaintif dan membenarkan tuntutan balas. Tidak berpuas hati, plaintif memfailkan rayuan ke Mahkamah Tinggi. Hakim Mahkamah Tinggi yang bijaksana menolak rayuan plaintif dan mengesahkan

keputusan mahkamah sesyen. Oleh itu, permohonan kebenaran merayu ini oleh plaintif.

Diputuskan, menolak permohonan dengan kos RM10,000:

(1) Terdapat penilaian yang cukup terhadap keterangan secara keseluruhan oleh hakim bicara dalam mencapai kesimpulan bahawa defendan telah memenuhi semua kewajibannya. Jelas sekali tiada kesilapan prima facie kerana fakta dan undang-undang telah dipertimbangkan dengan sewajarnya dan inklusif serta diputuskan secara betul oleh hakim bicara dan hakim rayuan. Merit permohonan kebenaran itu, dalam apa jua keadaan tidak relevan. Plaintif juga gagal membangkitkan sebarang persoalan undang-undang tetapi sebaliknya hanya mengemukakan persoalan fakta yang telah ditangani dengan sewajarnya secara terperinci oleh hakim bicara. Plaintif telah gagal memenuhi prinsip yang dinyatakan oleh mahkamah dalam *Pang Hon Chin v Nahar Singh* [1986] 2 MLJ 145. Dengan premis itu, tiada merit dalam permohonan plaintif untuk menjamin mahkamah menjalankan kuasanya untuk mengganggu penemuan mahkamah bawahan (lihat perenggan 24–27).]

Cases referred to

Country Garden Danga Bay Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor [2019] MLJU 1295; [2020] 4 CLJ 865, CA (refd)
Pang Hon Chin v Nahar Singh [1986] 2 MLJ 145 (folld)
United Oriental Assurance Sdn Bhd v Penang Medical Centre Sdn Bhd [1999] 2 MLJ 542, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 68, 68(1)(a)

Appeal from: Civil Appeal No BL-12B-16–10 of 2022 (High Court, Klang)

YM Raja Saidatul Akhma Raja Lope (with Amelia Edreena Azmir) (Lope Maizura) for the appellant.
Joshua Kevin (with Leng Wie Mun and Reuben Ong) (Kevin & Co) for the respondents.

Azmi Ariffin JCA:

INTRODUCTION

[1] Enclosure 1 dated 8 March 2023 is the applicant notice of motion for leave to appeal against the decision of the Klang High Court dismissing the applicant's appeal against the decision of the Klang Sessions Court judge on 28 September 2022.

[2] For ease of reference, the appellant shall be hereinafter referred to as the plaintiff and the respondents as the defendant in this judgment.

THE SUIT

[3] On 26 February 2019, an Australian Company named Liquip Victoria has awarded the plaintiff a contract to supply aluminium alloys amounting USD78,425 (RM335,580.58) via purchase order dated 26 February 2019.

[4] The contract requires the plaintiff to ship 20 aluminium alloys flood lighting columns ('AAFLCs') to Mobil Oil Micronesia Incorporation at Majuro Bulk Plant, Marshall Island, Australia by 12 April 2019.

[5] The plaintiff appointed the defendant to supply 20 aluminium alloys flood lighting columns (AAFLCs) pursuant to a purchase order dated 21 March 2019 (hereinafter referred to as the said 'first PO' in order for the plaintiff to fulfil the order made by Liquip Victoria.

[6] The first PO was then substituted by the purchase order dated 25 March 2019 (hereinafter referred to as the 'second PO') due to a typographical error. The contract price pursuant to the second PO was RM147,550. The payments were to be made in four tranches which were as follows:

(a) first payment of 30% (RM44,265);

(b) second payment of 30% (RM44,265);

(c) third payment of 35% (RM51,642.50); and

(d) fourth payment of 5% (RM7,377.50).

[7] The second PO sets out the following scope of work for the defendant:

(a) to prepare metal specimen and 20 sets of AAFLC; and

(b) to deliver the said two specimens for post weld heat treatment ('PWHT') test.

[8] The plaintiff had made the first and second payments amounting to a total sum of RM88,530 to the defendant via invoice No 2222 dated 22 March 2019 (RM44,265) and invoice No 2231 dated 29 April 2019 (RM44,265) respectively.

[9] It is the plaintiff's case that the defendant was supposed to have delivered the AAFLCs by late May or early June 2019. Unfortunately, this did

not happen which resulted in considerable delay and eventually in September 2019, the plaintiff had to procure the AAFLCs from a company in China.

[10] It is the defendant's case that in June 2019, the defendant had completed the fabrication work for 20 sets of AAFLC and had successfully performed the factory acceptance test ('FAT') in the presence of the plaintiff's representatives. The defendant has also sent the AAFLC's specimens for the PWHT process and the test had been carried out. The defendant have performed their obligations under the PO and there was no total failure of consideration. The invoice No 2242 dated 22 July 2019 for the outstanding sum of RM34,642.50 due to the defendant was still not paid.

[11] On 30 June 2020, the plaintiff filed a suit against the defendant in the Klang Sessions Court for a refund of deposit of RM44,265, a refund of the second stage payment of RM44,265 and a reimbursement of RM96,834.04 for new the order of AAFLC which the plaintiff had to obtained from China, interest and costs.

[12] The defendant filed their defence and its counterclaim against the plaintiff claiming for a declaration that the amended PO is unlawfully terminated by the plaintiff and the sum of RM34,642.50 is to be paid to the defendant from the date of the judgment.

[13] On 28 September 2022, the learned sessions court judge dismissed the plaintiff's claim and allowed the counterclaim of RM34,642.50 with costs of RM4,855.

[14] Dissatisfied, in October 2022, the plaintiff filed an appeal to the Klang High Court.

[15] On 7 February 2023 the learned High Court judge dismissed the plaintiff's appeal and affirmed the sessions court decision.

[16] By reason that the adjudged sum awarded is below the RM250,000 threshold pursuant to s 68(1)(a) of the Courts of Judicature Act 1964, the plaintiff applied for leave to appeal to this court.

THE SESSIONS COURT DECISION

[17] On 28 September 2022, after five days of trial, the learned sessions court judge dismissed the plaintiff's claim and granted the respondent's counterclaim. The reasons stated amongst others, are as follows (p 489 encl 25 *ikatan teras bersama*):

[44] Based on the evidence, this court was of the view the the plaintiff cannot deny the fact that the defendant had completed the fabrication. The fact that the plaintiff's submissions regarding the delay of the fabrication and the delivery of the poles clearly pointed out that the defendant had completed the AAFLC poles.

[45] Thus, this court agreed with the defendant's submissions that the plaintiff ought to be estopped by conduct or by principle of approbation and reprobating.

[49] Based on the evidence above, this court accepted the defendant's submissions that there was no challenges nor complaints by the plaintiff in relation to the progress report prepared and FAT conducted by the defendant.

[50] Therefore, since there was neither objection nor dispute from the plaintiff when the FAT was conducted, this court was of the view that the defendant has completed the fabrication work of AAFLC poles and distinctly, the plaintiff's submission is devoid of merits.

THE HIGH COURT'S DECISION

[18] At the High Court, the learned judge dismissed the plaintiff's appeal and affirmed the sessions court decision. However, the appellate judge had not provided written grounds for her judgment.

QUESTIONS OF LAW

[19] The plaintiff raised nine grounds in support of the questions of law which are briefly summarised as follows:

S.1: Bahawa hakim telah terkhilaf dari segi fakta dan undang-undang apabila menolak tuntutan pemohon terhadap responden.

S.2: Bahawa hakim telah terkhilaf dari segi fakta dan undang-undang apabila membenarkan tuntutan balas responden dengan membuat deklarasi bahawa pesanan belian bertarikh 25 Mac 2019 telah dibatalkan oleh pemohon secara tidak sah di sisi undang-undang.

S.3: Bahawa hakim telah terkhilaf dari segi fakta dan undang-undang apabila telah membenarkan tuntutan balas responden sebanyak RM34,642.50 dengan kos sebanyak RM4,855 dan faedah sebanyak 5% setahun dari tarikh penghakiman sehingga penyelesaian penuh.

S.4: Bahawa hakim telah terkhilaf dari segi fakta dan undang-undang apabila membuat dapatan pesanan belian bertarikh 21 Mac 2019 telah digantikan dengan pesanan belian bertarikh 25 Mac 2019.

S.5: Bahawa hakim telah terkhilaf dari segi fakta dan undang-undang apabila telah membuat dapatan bahawa responden telah menyempurnakan kerja-kerjanya menurut spesifikasi dalam pesanan belian bertarikh 21 Mac 2019.

S.6: Bahawa hakim telah terkhilaf dari segi fakta dan undang-undang apabila membuat dapatan bahawa fabrikasi aloy aluminium flood lighting columns telah dilengkapkan oleh responden.

S.7: Bahawa hakim telah terkhilaf dari segi fakta dan undang-undang apabila mengenepikan keterangan-keterangan dan bukti-bukti bahawa 'Factory Acceptance Test' belum berjaya dilakukan oleh responden.

S.8: Bahawa hakim telah terkhilaf dari segi fakta dan undang-undang apabila mengenepikan keterangan-kerterangan dan bukti-bukti bahawa 'Post Welding Heat Treatment' gagal dilengkapkan oleh responden.

S.9: Bahawa hakim telah terkhilaf dari segi fakta dan undang-undang apabila mendapati bahawa tiada total 'failure of consideration' yang melayakkan pemohon membatalkan pesanan belian bertarikh 21 Mac 2019.

OUR DECISIONS

[20] The plaintiff's application for leave is made pursuant to s 68 Court of Judicature Act 1964 which reads:

Non-appealable matters

(1) No appeals shah be brought to the Court of Appeal in any of the following cases:

(a) when the amount or value of the subject -matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal;

(b) where the judgment or order is made by consent of parties;

(c) where the judgment or order relates to costs only, which by law are left to the discretion of the Court, except with the leave of the Court of Appeal;

(d) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final;

(e) where a High Court dismissed any application for a summary judgment;

(f) where a High Court dismissed any application to strike out any writ or pleading; and

(g) where a High Court allowed any application to set aside a judgment in default.

(2) (Deleted).

(3) No appeal shall lie from a decision of a Judge in Chambers in a summary way on an interpleader summons, where the facts are not in dispute, except by leave of the Court of Appeal, but an appeal shall lie from a judgment given in court on the trial of an interpleader issue.

[21] In *Country Garden Danga Bay Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor* [2019] MLJU 1295; [2020] 4 CLJ 865, speaking through Harmindar Singh Dhaliwal JCA (as he then was) held as follows:

[7] Applications for leave to appeal to the Court of Appeal are governed by s 68(1)(a) of the CJA 1964 which effectively states that no appeal shall be brought to the Court of Appeal when the amount or value of the subject-matter of the claim (exclusive of interest) is less than RM250,000, except with the leave of the Court of Appeal.

[8] Where appeals are filed without leave having been obtained, and where leave is required, the court has no jurisdiction to hear the appeal (see *Harcharan Singh Sohan Singh v Ranjit Kaur S Gean Singh* [2011] 3 CLJ 593 ('Harcharan Singh')). The requirement for leave serves as a filter against frivolous or unmeritorious proceedings (*O'Reilly v Mackman* [1983] 2 AC 237). It must follow that no appeal can be filed against the decision of the Court of Appeal regarding leave as otherwise the filter principle would be defeated (*Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 1 MLJ 129; [2000] 1 CLJ 1 ('Lam Kong')).

[22] It is trite that an appellate court will not interfere with the finding of the court below unless it can be shown the lower court had erred. In order to succeed for leave to appeal, the plaintiff must meet the threshold set out in *Pang Hon Chin v Nahar Singh* [1986] 2 MLJ 145 where Edgar Joseph Jr J (as he then was) held as follows:

> The circumstances in which leave to appeal will be granted would include cases where the applicant is able to demonstrate a prima facie case of error (see (1907) 123 LT Jo 202) or if the question is one of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to the public advantage.

[23] This principle was further echoed in the Court of Appeal case of *United Oriental Assurance Sdn Bhd v Penang Medical Centre Sdn Bhd* [1999] 2 MLJ 542 wherein:

(a) the applicant, United Oriental Assurance Sdn Bhd, was the second defendant in the court below. The court had held that applicant was generally liable to the respondent as insurer per se. The respondent had filed a claim against the appellant and the first defendant for a sum less that than RM250,000. Thus, this application for leave to appeal to the Court of Appeal;

(b) the applicant contended that leave to appeal should be given on grounds that the decision of the trial judge affects a fundamental principle of law, is of vital importance in the public interest, involves a serious and important issue of law, and there is a question of general principle where further argument before a higher tribunal would be of public advantage; and

(c) the Court of Appeal through Abu Mansor JCA (as he then was) delivering the judgment of the court found that there had been no error

by the court below and therefore no reason to interfere with its finding. The application for leave was dismissed.

[24] Having read the learned sessions court judge's ground of judgment, we find there is sufficient appreciation of the evidence in its entirety by the trial judge in arriving at the conclusion that the defendant had fulfilled all its obligations.

[25] There is unequivocally no prima facie error as the facts and law have been appropriately and inclusively considered and rightfully decided upon by the trial judge and appellate judge. We are mindful that the merits of the leave application are, in any event irrelevant.

[26] The plaintiff had also failed to raise any questions of law but instead merely advance questions of fact which have been appropriately addressed in detail by the trial judge.

[27] In the premises, we unanimously find that the plaintiff had failed to meet the principles enunciated by the court in *Pang Hon Chin*. We find no merits in the plaintiff's application to warrant this honourable court to exercise its powers to interfere with the finding of the court below.

[28] For reasons stated above, the applicant/plaintiff application is dismissed with costs of RM10,000. The costs are subject to allocatur fees.

Application dismissed with costs of RM10,000.

Reported by Nabilah Syahida Abdullah Salleh